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CRIMINAL LAW ISSUES

JOHNSON v. STATE, No, 11S00-9904-CR-244, ___ N.E.2d ___ (Ind. May 24, 2001).
RUCKER, J.

Along with his pre-trial motion for change of venue, Johnson also filed a motion to sequester the jury. The trial court denied the motion, and Johnson claims error. He correctly points out that in cases where the State is seeking the death penalty, the trial court must sequester the jury if the defendant requests it. Holmes v. State, 671 N.E.2d 841, 854 (Ind. 1996); Baird v. State, 604 N.E.2d 1170, 1186 (Ind. 1992); Lowery v. State, 434 N.E.2d 868, 870 (Ind. 1982). According to Johnson, the same considerations underlying jury sequestration in capital cases are equally applicable here where the State is seeking a sentence of life without parole.

It is true that a sentence of life without parole is subject to the same statutory standards and requirements as the death penalty. [Citations omitted.] However, there is no statutory requirement for sequestration of a jury in a capital case. Rather, with respect to any case tried to a jury "the jurors may separate when court is adjourned for the day, unless the court finds that the jurors should be sequestered in order to assure a fair trial." Ind.Code § 35-37-2-4(b).

The rule requiring a trial court to grant a defense request for jury sequestration in capital cases represents a policy decision that acknowledges the extreme finality of the death penalty. Although some may regard the punishment of life imprisonment without the hope of release as equally severe as the death penalty, [footnote omitted] the fact remains that these two sentences are qualitatively different. It is this difference that compels a conclusion that sequestration is a mandatory requirement upon request in capital cases. However, in non-capital cases jury sequestration is a matter left to the discretion of the trial court. [Citation omitted.] . . . Although the burden a jury faces in determining whether to recommend a life sentence is indeed great, we do not believe that the decision to sequester the jury in such cases should be removed from the trial court's discretion. We find no abuse of discretion here.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and SULLIVAN, JJ., concurred.

MARLEY v. STATE, No. 49S02-0009-CR-521, ___ N.E.2d ___ (Ind. May 30, 2001).
BOEHM, J.

We grant transfer in this criminal appeal to discuss the application of the effects of battery statute.

. . . .

Defense counsel hired a clinical psychologist, Dr. Bart Ferraro, who diagnosed Marley with dysthymia, post-traumatic stress disorder, polysubstance abuse, and mixed personality disorder. He concluded that her problems stemmed largely from early childhood molestation by Donald. In his opinion, at the time of the crimes, she was not conscious of her actions due to post-traumatic stress disorder and dissociation. In his view, she met the criteria for an insanity defense. Marley did not file a notice of insanity defense as required by the Indiana Code.

On January 7, 1999, the State filed a motion in limine to exclude a videotape of Marley and Donald engaged in various sexual acts. The motion also sought to exclude Ferarro's testimony because Marley had not given notice of an insanity defense. Marley responded that the videotape established her dissociative state and that the doctor's testimony was admissible, not to support an insanity defense, but to rebut the mens rea element of murder. The trial court conducted hearings on the motions and denied the State's motion with respect to Ferarro's testimony, but determined that because Ferarro's testimony related to mental disorders, in order to present it, Marley had to comply with the effects of battery statute, Indiana Code sections 35-41-1-3.3 and 35-41-3-11, which the trial court concluded requires a notice of an insanity defense. . . .

. . . Marley filed a second notice of defense and argued that the trial court was violating her due process, Sixth Amendment, and Fourteenth Amendment rights by prohibiting her from admitting evidence of her relationship with Donald and her mental status to show lack of mens rea and voluntariness without complying with the insanity defense. . . .

. . . The Court of Appeals affirmed the trial court's rulings. Marley v. State, 729 N.E.2d 1011 (Ind. Ct. App. 2000). Judge Brook, in dissent, found that the effects of battery statute did not apply to this case because Marley and Donald were not "cohabitants" as that term is used in the statute. [Citation omitted.]

. . . . The effects of battery statute is found among the "defenses relating to culpability." It applies to a defendant who either (1) "raises the issue [of] not responsible as a result of mental disease or defect" (for convenience we refer to this as an "insanity" defense)[1] or (2) "claims to have used justifiable reasonable force" ("self-defense"), and, in conjunction with either, "raises the issue that the defendant was at the time of the alleged crime suffering from the effects of battery as a result of the past course of conduct of the individual who is the victim of the alleged crime." Ind.Code § 35-41-3-11 (1998).

Although not limited by its terms to battered women, the statute typically comes into play with respect to efforts to introduce evidence of battered women's syndrome in defense of a charge against the mistreated victim. It is far from clear from the language of this statute what it is intended to do. It does not explicitly limit the use of battered women's syndrome evidence to the self-defense and insanity theories. It imposes notice requirements on a defendant claiming self-defense, but has no comparable provision with respect to insanity. Presumably the absence of any notice requirement with respect to insanity is because the insanity defense statute has its own notice requirement. Id. § 35-36-2-1. Self-defense has no similar provision. The sum of this is that, although the statute states that it applies to an insanity defense, it has no substantive or procedural provisions with respect to insanity. Read literally, the statute does nothing with respect to insanity, and the reference to the insanity defense is surplusage.

. . . .

[1] The defense we refer to in short as "insanity" is more precisely defined as being "unable to appreciate the wrongfulness of the conduct" as a result of "a severely abnormal mental condition that grossly and demonstrably impairs [the defendant's] perception." Ind.Code § 35-41-3-6 (1998). If such a defense is asserted the statute requires notice to the trial court, id. § 35-36-2-1, and places the burden of establishing the defense on the defendant by a preponderance of the evidence, id. § 35-41-4-1(b).

As already observed, if the purpose of the 1997 legislation was to require that battered women's syndrome evidence be limited to self-defense and insanity, the language chosen is less than clear. Nevertheless, we agree with the trial court that the statute is intended to have that effect, if for no other reason than it would otherwise be meaningless as to insanity. . . .

Marley's claim of a "dissociative state" as a result of battered women's syndrome, like Barrett's claim, is a claim that an abnormal condition has impaired the defendant's perception of the action taken. If the lack of knowledge or intent is attributable to a "mental disease or defect," which is the nature of Marley's evidence, it falls within the legislature's definition of the "insanity" defense and must be asserted accordingly. . . . [W]e conclude that the legislature has determined that, where the defendant claims that battered women's syndrome has affected her ability to appreciate the wrongfulness of her conduct, she must proceed under the insanity defense. Barrett predated the statute. To the extent that Barrett suggests that battered women's syndrome evidence is admissible on the issue of lack of intent or knowledge without compliance with the insanity statute, it is superseded by the 1997 legislation.

. . . .

Barring battered women's syndrome evidence as to a defendant's state of mind where the defendant has not complied with the insanity statute does not affect its admissibility for other purposes. For example, in Barrett, the Court of Appeals concluded that the defendant was "denied the opportunity to present evidence essential to her defense" when she was prevented from responding to prosecutor's questioning during opening and closing arguments as to why she remained with her abusive boyfriend. Barrett, 675 N.E.2d at 1117. We agree with the Court of Appeals that evidence of battered women's syndrome, in the form of her lay testimony and expert testimony, would have been relevant to explain Barrett's motive for remaining with her boyfriend. See also Isaacs, 659 N.E.2d at 1040-41 (evidence of battered women's syndrome admissible to refute defendant's claim that relationship with former wife he was accused of murdering was "friendly"); Dausch v. State, 616 N.E.2d 13, 15 (Ind. 1993) (evidence of battered women's syndrome admitted to explain alleged rape victim's recanting of story of abuse at hands of defendant); Carnahan v. State, 681 N.E.2d 1164, 1166-67 (Ind. Ct. App. 1997) (evidence of battered women's syndrome relevant to credibility of wife who claimed husband had abused her but then recanted at trial); Allen v. State, 566 N.E.2d 1047, 1053 (Ind. Ct. App. 1991) (evidence was admitted at sentencing that woman convicted of criminal recklessness had been abused by the victim husband).

. . . .

An ex post facto law is retroactive in application. [Citation omitted.] In this case, the charged offenses occurred on June 11, 1997 and the effects of battery statute became effective on July 1, 1997. The law is clearly retroactive as applied to this case. However, to run afoul of the constitutional bar to ex post facto laws, the law must "increase[] [the defendant's] punishment, change[] the elements of or ultimate facts necessary to prove the offense, or deprive[] defendant of some defense or lesser punishment that was available at the time of the crime." [Citation omitted.] . . .

Marley argues that the effects of battery statute deprives her of a battered women's defense that was recognized in Barrett,675 N.E.2d at 1116. The Court of Appeals in Marely's case expressed the view that Barrett did not "recognize a defense" based on battered women's syndrome. Rather, Barrett held that battered women's syndrome evidence can be admissible to show lack of mens rea, an otherwise recognized defense. To the extent the statute changed Indiana law, all it did was make explicit that this form of evidence must come in, if at all, through the procedures that govern proof of other types of insanity. To the extent that the Court of Appeals decision in Barrett could be read to establish an "intermediate" insanity defense, there is no ex post facto implication because

the Court of Appeals was not free to change the law of the state contrary to precedent of the Court. Thus, this statute does not raise the ex post facto concern that the legislature deprived the defendant of a defense or lesser punishment.

. . . Marley claims that the effects of battery statute does not apply to her because she and Donald were not "cohabitants" or "former cohabitants." The majority opinion in the Court of Appeals disagreed stating, "the legislature did not intend 'cohabitant' to necessarily mean a sexual partner, and, thus, Donald was a cohabitant as to Marley." Marley, 729 N.E.2d at 1016. The dissent argued that both the plain meaning of cohabitation and the use of the term cohabitant in other contexts lead to the conclusion that "the term 'cohabitant' appears to be one of limited application, meaning . . . a person who lives with another as husband and wife or in a comparable sexual relationship." Id. at 1019. We agree with the dissent that the term "cohabitant" requires not only living together under one roof, but also has an element of an ongoing relationship of at least lovers.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

SHARBER v. STATE, No. 29A04-0012-CR-538, ___ N.E.2d ___ (Ind. Ct. App. May 29, 2001).
BAKER, J.

[B]lood alcohol content tests are admissible so long as standards and regulations for such testing are met in accordance with IND. CODE § 9-30-6-5. . . . Our supreme court has recognized that a defendant does not enjoy an unlimited constitutional right to offer exculpatory evidence. [Citation omitted.] . . .

Here, Sharber has presented no evidence demonstrating that the portable breath test satisfied the requirements of I.C. § 9-30-6-5. Moreover, he did not establish any of the foundational requirements for the admission of those results. It was never established that any standards or procedures even existed for the test, and Officer Greer testified at trial that the portable test was a hand-held instrument that did not meet any of the certification requirements. He further acknowledged that this instrument was used only to confirm or deny the presence of alcohol in an individual.

While Sharber asserts that he was denied the right to due process because he could not present the results of the portable breath test to the jury, we note that evidence was presented on both direct and cross-examination that the portable breath test was given, along with the field sobriety tests. It is apparent that the trial court granted the motion in limine for the purpose of excluding unreliable evidence from the trier of fact. As a result, the trial court did not err in denying Sharber's request to admit the results of the portable breath test.

. . . .

BAILEY and MATHIAS, JJ., concurred.

STATE v. STRAUB, No. 41A01-0101-CR-23, ___ N.E.2d ___ (Ind. Ct. App. May 30, 2001).
ROBB, J.

As we have previously mentioned, Officer Grable had reasonable suspicion that Straub was the driver of the truck with an attached snowplow blade and that he had operated the vehicle while impaired or intoxicated. However, Officer Grable was unable to effect a Terry stop due to Straub's active fleeing from the police officer. It wasn't until Officer Grable had detained Straub and questioned him that he obtained probable cause to believe that Straub was operating a vehicle while intoxicated. [Citation to Record omitted.]

During the entire incident, the progression of time naturally began to dissipate the alcohol in Straub's body. If Officer Grable was forced to obtain a warrant to enter the residence, it is entirely possible that Straub no longer would have been impaired or intoxicated. Although there was not a fear that Straub would actively destroy the evidence,

there was an objective and reasonable fear that time would destroy evidence of Straub's impairment or intoxication.

The facts of this case are markedly different than those of Timmons v. State, 723 N.E.2d 916 (Ind. Ct. App. 2000), on reh'g 734 N.E.2d 1084 (Ind. Ct. App. 2000). In Timmons, the police received a tip that the defendant had been involved in two hit-and-run accidents. 723 N.E.2d at 918. The police later determined that the car parked in front of the defendant's residence matched the description of the hit-and-run vehicle. Id. The defendant's sister confirmed that he was inside the residence but refused to come out. Id. We held that the police were required to obtain a valid warrant before entering the residence to arrest Timmons for the two misdemeanor offenses. [Citation to Record omitted.] . . .

In the present case, Officer Grable was in continuous pursuit of Straub and had reasonable suspicion that he operated the truck with the snowplow while impaired or intoxicated. An intervening event did not occur to create a time lag from Officer Grable's knowledge and observation of the impaired driving to the pursuit of Straub as the likely traffic offender. The events occurred in rapid succession and in close proximity in time to one another. Moreover, Straub committed at least one misdemeanor offense in his presence, fleeing law enforcement, and we believe that it was reasonable for Officer Grable to assume that Straub ran in order to cloak the additional offense of operating a vehicle while intoxicated. We have no doubt that Straub realized that if he was detained by Officer Grable, he would be administered a blood alcohol test. We do not believe that a defendant should be able to benefit from nature destroying the only evidence of the crime because he was more "fleet of foot" than a pursuing police officer close on the defendant's heels. Therefore, we hold that the trial court erred in granting Straub's motion to suppress because Officer Grable was justified in pursuing Straub into his home in order to preserve evidence of Straub's blood alcohol content.

. . . .

VIADIK, J., concurred.

BROOK, J., filed a separate written opinion in which he dissented, in part, as follows:

> I agree with the standard cited by the majority for reviewing motions to suppress. [Citations omitted.] I part ways with the analysis and conclusion.
>
> . . . .
>
> We have found "the threat of the 'metabolic destruction of the evidence' of a suspect's intoxication, i.e., the bodily absorption of the alcohol in his bloodstream" to be exigent circumstances. *Zimmerman v. State*, 469 N.E.2d 11, 17 (Ind. Ct. App. 1984) (citing *Shultz v. State*, 417 N.E.2d 1127, 1138 (Ind. Ct. App. 1981)). In view of *Zimmerman*, I am willing to agree with the majority's assertion that exigent circumstances existed. [Citation omitted.] However, the exigent circumstance of dissipation of alcohol does not seem to be of the same magnitude as the other types of exigent circumstances.
>
> As I have already noted, exigent circumstances must be coupled with probable cause to arrest. . . .
>
> Until he spoke with Straub, Officer Grable knew only that: (1) a citizen had reported that a truck was being driven erratically; and (2) a man was running away from the area where Officer Grable had lost sight of the truck. There was no evidence that the citizen gave a description of the driver of the truck. . . . Hence, Officer Grable did not know if Straub was the driver of the truck, let alone if the driver was intoxicated. [Citation omitted.] Given these facts, I would agree that Officer Grable had reasonable suspicion to stop Straub and question him further. However, I do not believe that, prior to Officer Grable's warrantless entry into Straub's apartment, he had probable cause to arrest Straub for operating while intoxicated.

. . . .

THOMAS v. STATE, No. 30A01-0008-CR-280, ___ N.E.2d ___ (Ind. Ct. App. May 30, 2001).
MATTINGLY-MAY, J.

The pertinent portion of the statute is as follows:

> **35-42-2-6 Battery by body waste**
> (c) A person who knowingly or intentionally in a rude, insolent, or angry manner places blood or another body fluid or waste *on a law enforcement officer* or a corrections officer identified as such and while engaged in the performance of official duties or coerces another person to place blood or another body fluid or waste on the law enforcement officer or corrections officer commits battery by body waste, a Class D felony.

(Emphasis added.) We decline to find that this statute is ambiguous. As we are bound to give words in a statute their plain and ordinary meaning, we find that "on a law enforcement officer" means just that – on the officer's person, whether that portion of the officer's person be clothed or not. . . .

. . . .

SHARPNACK, C. J., and BAILEY, J., concurred.

MARTIN v. STATE, No. 03A01-0012-PC-412, ___ N.E.2d ___ (Ind. Ct.. App. May 31, 2001).
VAIDIK, J.

A panel of this court extended the Purcell [v. State, 721 N.E.2d 220 (Ind. 1999)] reasoning in Dishroon [v. State, 722 N.E.2d 385 (Ind. Ct. App. 2000)] to cover appellants seeking credit for time served on home detention as a condition of probation. We found that the distinction between an individual placed in a community corrections program and an individual placed in home detention as a condition of probation is irrelevant. Dishroon, 722 N.E.2d at 389. We reasoned further that even though a defendant is serving time at home, restrictions are still being placed on his liberty and he is entitled to the credit for time actually served. *Id.*

We reconsidered the Dishroon rationale on the issue of credit for time served on home detention as a condition of probation in Palmer v. State, 744 N.E.2d 525 (Ind. Ct. App. 2001). We found that there was a distinction between the statutory language governing community corrections and probation. In particular, unlike violating the terms of placement in community corrections programs, violating the terms of a condition of probation does not dictate that the individual be committed for the "remainder" of his sentence. Instead, upon violation of the terms of probation, the court may "order execution of the sentence that was suspended at the time of the initial sentencing." Palmer, 744 N.E.2d at 528 (quoting IND. CODE § 35-38-2-3(g)[4]. . . .

In addition, we found that the purpose and policy underlying probation supports denying credit time for probation violations. [Citation omitted.] Specifically, the purpose of home detention is to rehabilitate the probationer. [Citation omitted.] . . .

As we noted in Palmer, this is a complex area of the law where reasonable minds may differ. However, based on the statutory provisions, the objective of probation, and the degree of restriction of liberty outlined in Palmer, we find that Martin is not entitled to credit for the time he served on home detention as a condition of his probation.

. . . .

BROOK, J., concurred.
ROBB, J., filed a separate written opinion in which she dissented, in part, as follows:

> I respectfully dissent. I write separately because I believe Martin should receive credit for the 139 days he served on home detention. . . .

. . . Our decision in Dishroon was handed down on January 24, 2000. On January 16, 2001, Senate Bill No. 358 was first read. It provides that a person on home detention, as a condition of probation, shall receive credit for time served. . . . Clearly, the purpose of this bill was to clarify, not change, our decision in Dishroon. Thus, I believe Palmer, to the extent that it disagrees with our holding in Dishroon, is incorrect. Further, I find the distinction laid out in Palmer that home detention in the community corrections and the probation contexts are different, particularly deciding when a defendant on home detention is entitled to credit time, is also erroneous. . . .

Further, the majority opinion, citing the Palmer case, states that "the purpose of home detention is to rehabilitate the probationer." [Citation omitted.] In so much as the majority believes the fact that the purpose of home detention is to rehabilitate the probationer determines whether or not credit time is due, I wish to reiterate that under the Indiana Constitution, all sentences and "punishment" are deemed to have the purpose of rehabilitating the defendant. . . . As such, to the extent that the majority reasons that the fact that the rehabilitative purpose of home detention therefore precludes credit time, I disagree. . . .

. . . .

CIVIL LAW ISSUES

PROGRESSIVE INSURANCE CO. v. GENERAL MOTORS CO., No. 56S03-0106-CV-266, N.E.2d ___ (Ind., June 7, 2001).

BOEHM, J.

Once again we are faced with a policy argument that precedent from this Court construing a statute is ill conceived. We agree that valid arguments are raised for and against recovery under the Products Liability Act for damages to a product sustained as a result of the product's own defect. However, we believe these policy considerations are for the legislature and adhere to the view that the Indiana Products Liability Act does not support such a claim.

. . . .

This case involves five consolidated appeals from the grant or denial of summary judgment on the issue of whether a vehicle owner may recover under the Products Liability Act from the manufacturer for damage to the vehicle sustained when the vehicle caught fire. In each of these five cases, only the vehicle was severely damaged, allegedly due to defects in the wiring, the fuel lines, or the transmission line. The plaintiffs are insurance companies who sued as subrogees to recoup the amounts they paid to their insureds as owners of the vehicles. The plaintiffs contend that these claims are cognizable under the Products Liability Act. The manufacturers, General Motors Corporation and the Ford Motor Company, assert that the owners, and therefore their subrogees, are restricted to their contractual rights under their warranties where the only damage is to the product itself.

The Court of Appeals agreed with the insurance companies' contention that the Products Liability Act was unclear on this point, and expressed the view that policy considerations favored the plaintiffs' claims under the Act. However, the Court of Appeals considered itself bound by our decisions in Martin Rispens & Son v. Hall Farms, Inc., 621 N.E.2d 1078 (Ind. 1993), and Reed v. Central Soya Co., 621 N.E.2d 1069 (Ind. 1993), modified on other grounds by 644 N.E.2d 84 (Ind. 1994). Progressive Ins. Co. v. General Motors Corp., 730 N.E.2d 218, 221 (Ind. Ct. App. 2000). In Rispens and Reed, we concluded that there is no recovery under the Products Liability Act where the claim is based on damage to the defective product itself. Because this is a recurring subject of transfer petitions, we grant transfer to settle this issue. We reaffirm the view taken in Reed and Rispens.

SHEPARD, C.J., and SULLIVAN, J., concurred.
RUCKER, J., concurred in result with separate opinion in which DICKSON, J., concurred, on the basis that *Rispens* and *Reed* compel the result as *stare decisis*.

FLEETWOOD ENTERPRISES v. PROGRESSIVE NORTHERN INSURANCE CO., No.45S03-0106-CV-265, __ N.E.2d __ (Ind., June 7, 2001).
BOEHM, J.

In Progressive Insurance Co. v. Ford Motor Co., ___ N.E.2d ___, ___ (Ind. 2001), we held that the Products Liability Act does not support an action based on a defect in a product where the only damage is to the product itself. In this case a defect in the product is alleged to have damaged both the product itself and also other property. We hold that personal injury and damage to other property from a defective product are actionable under the Act, but their presence does not create a claim under the Act for damage to the product itself.

SHEPARD, C.J., and SULLIVAN, J., concurred.
RUCKER, J., concurred in result with separate opinion in which DICKSON, J., concurred, on the basis that *Rispens* and *Reed* compel the result as *stare decisis*.

OXLEY v. MATILLO, No. 32A05-0011-CV-501, ___ N.E.2d ___ (Ind. Ct. App. May 25, 2001).
BAKER, J.

Matillo argued that the Oxleys' failure to tender a summons before the statute of limitations tolled was a bar to the action. After a hearing on the matter, the trial court granted the Matillo's motion to dismiss. The Oxleys now appeal.

. . . We note that a split of authority exists among the panels of this court regarding what steps a plaintiff must take to commence an action. The controversy centers on the extension of our supreme court's decision in Boostrom v. Bach, 622 N.E.2d 175 (Ind. 1993), cert. denied, 513 U.S. 928 (1994).

In Boostrom, the court dealt with a plaintiff's failure to tender a filing fee when she filed a "notice of complaint," which is the analogue to the "complaint" under Indiana Trial Rules, in small claims court. . . . The Boostrom court noted that the applicable rule for filing in small claims court—Ind. Small Claims Rule 2(A)—"tracks" that of Ind. Trial Rule 3. [Citation omitted.] Our supreme court also reasoned:

> The plaintiff, of course, controls the presentation of all documents necessary to commencement of a suit: the complaint, the summons, and the fee. Boostrom used a standard pre-printed small claims form, which contains the complaint and the summons on a single page. She thus filed two of the three items necessary to commencement of her action.

[Citation omitted.] In the end, the Boostrom court determined that absent the filing fee the plaintiff's action was not commenced within the limitations period and, thus, was properly dismissed by the trial court. [Citation omitted.]

In Fort Wayne International Airport v. Wilburn, a divided panel of this court relied on Boostrom in a case where the plaintiff failed to tender the summons before the limitations period had expired. {Citation omitted.] . . . The Wilburn majority held that a summons, along with a complaint and a filing fee, must be tendered to commence a civil action tolling the statute of limitations. [Citation omitted.] . . .

Another divided panel of this court recently held that filing the complaint is the one necessary step in commencing a civil action. Ray-Hayes v. Heinamann, No. 89A05-0007-CV-306, 2001 WL 101510 (Ind. Ct. App. Feb. 7, 2001). The Ray-Hayes court relied on the plain language of T.R. 3, which provides: "A civil action is commenced by filing a complaint with the court or such equivalent pleading or document as may be specified by statute." . . .

We find the reasoning of Ray-Hayes persuasive and view the Oxleys filing of their complaint as commencing their civil action under T.R. 3. . . .

. . . .

BAILEY and MATHIAS, JJ., concurred.

PARKVIEW HOSP., INC. v. ROESE, No. 02A05-0009-CV-386, ___ N.E.2d ___ (Ind. Ct. App. May 25, 2001).

DARDEN, J.

ISSUE

Whether Indiana's Hospital Lien Statute requires Parkview to first seek payment for medical services from Medicare before filing a lien against Roese.

. . . .

[P]arkview argues that the trial court erroneously granted Roese's motion to quash. Specifically, Parkview argues that federal Medicare statutes and regulations prevent it from pursuing payment from Medicare when automobile liability insurance is available. Roese argues that Indiana's Hospital Lien Statute requires Parkview to make all reasonable efforts to collect from medical insurance proceeds before "the establishment of a valid hospital lien . . . ." [Citation to Brief omitted.] Roese also argues that federal statutes and regulations do not prevent Parkview from collecting payment from Medicare.

. . . .

Indiana Code § 32-8-26-3 is clear and unambiguous. . . . [S]ubsection (b)(5) requires that a hospital's lien be reduced by the amount it receives from insurance proceeds "after the hospital has made all reasonable efforts to pursue the insurance claims in cooperation with the patient." [Citation omitted.] This subsection imposes a duty upon the hospital to also seek reimbursement for medical services from the patient's medical insurer if the lien's perfection is to be maintained. The unpaid portion can then be secured through a lien, insuring "that hospitals are compensated for their services." [Citation omitted.]

However, federal legislation or regulations may affect whether a hospital can submit a claim to Medicare before pursuing payment from another source. If so, the existence of Medicare may preempt the Hospital Lien Statute. . . .

. . . .

In this case, we find that Congress's intent is clearly expressed in 42 U.S.C. § 1395y(b)(2)(A)(ii). It explicitly prohibits medical service providers from collecting payment from Medicare when payment can reasonably be expected to be made promptly under an automobile or liability insurance policy. . . .

. . . We find the DHHS's interpretation of the regulations resolves the conflict. . . . [W]e hold that because these regulations are in conflict with Indiana's Hospital Lien Statute, the statute - which requires hospitals to first make all reasonable efforts to secure payment from medical insurance to maintain a perfected lien - is preempted if the medical insurance in question is Medicare. [Citation omitted.]

. . . .

The interpretation's mandatory language is clear; "Within the 120 day 'promptly' period, [Parkview] *must* bill only the liability insurer, ..." [Citation to Record omitted.] Despite having received the DHHS's interpretation letter more than two years prior, Parkview chose to file a lien against Roese within the 120 day promptly period on April 15, 1999. However, once the July 28, 1999 deadline expired, the DHHS interpretation gave Parkview a choice: (1) it could have filed for conditional payment from Medicare if an insurance settlement had not been finalized and waived its lien against Roese; or (2) it could have pursued "its claim against the liability insurance settlement" and waived Medicare reimbursement. [Citation to

Record omitted.] Parkview chose the latter and filed its lien against Roese, giving notice to Allstate. Parkview's actions after July 28, 1999 were consistent with the DHHS regulations governing Medicare as a secondary payer to automobile and liability insurance.

Therefore, we find the trial court erred in granting Roese's motion to quash. The trial court's interpretation of Indiana's Hospital Lien Statute conflicts with Medicare statutes and regulations by making Medicare a primary payer.

. . . .

RILEY and ROBB, JJ., concurred.

JOHNSON COUNTY PLAN COMM'N v. TINKLE, No. 41A04-0010-CV-425, ___ N.E.2d ___ (Ind. Ct. App. May 29, 2001).

MATHIAS, J.

Although they were aware of a 1976 ordinance that prohibited the division of tracts of ten acres or more into three or more lots, the Tinkles purchased a ten-acre piece of land with the intention of creating a subdivision. At the time of their application for plat approval in 1999, the Commission had approved thirty-two subdivision plats that contravened the 1976 ordinance. However, the Commission denied the Tinkles' request based on the 1976 ordinance and traffic safety concerns.

On March 24, 2000, the Tinkles filed a petition for writ of certiorari in Johnson County Superior Court. On August 22, 2000, the trial court granted the writ of certiorari, reasoning that the Commission was "estopped from denying the plat based on previous actions and the [Tinkles'] reliance on such." [Citation to Record omitted.] . . .

. . . .

The doctrine of equitable estoppel requires three elements: "(1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially." [Citation omitted.] The Tinkles acknowledge the general rule that a governmental entity cannot be estopped by the unlawful acts of public officials. [Citation omitted.] However, this prohibition is not absolute. [Citation omitted.] This court has recognized equitable estoppel can be applied against a governmental entity when "the public interest" will be threatened. [Citations omitted.] . . .

. . . .

[T]he Tinkles had no contact with the Commission prior to their purchase of land and were given no assurances that their proposed subdivision would be approved. Rather, they clearly knew that their proposed subdivision plat violated an ordinance, albeit one that had not previously been enforced. The Commission did nothing affirmatively, and certainly approved no permits, to signal eventual approval of the Tinkles' plan. . . . [T]he application of equitable estoppel in this case would give no benefit to the public, but rather would benefit only the Tinkles and would create traffic safety concerns.

. . . .

BAKER and BAILEY, JJ., concurred.

KLOTZ v. KLOTZ, No. 45A03-0011-CV-417, ___ N.E.2d ___ (Ind. Ct. App. May 30, 2001).

MATTINGLY-MAY, J.

Mother filed a Petition for Dissolution of Marriage. The parties entered into an Agreed Provisional Order for joint legal custody of the children, with Mother to have actual physical custody. Father subsequently filed a Petition for Modification of the provisional order, after Mother declared her intention to move to Nebraska with the children so that she might live with her boyfriend. The trial court did not rule on Father's petition; instead, it held a final dissolution hearing on October 5, 2000, and awarded sole legal and physical custody to Mother. Father then filed this appeal.

. . . .

We next consider whether this case falls under Ind. Code §3-17-2-23, the relocation statute. That statute provides that:

> If an individual who has been awarded custody of a child under this chapter intends to move to a residence . . . that is outside Indiana or at least one hundred (100) miles from the individual's county of residence; the individual must file a notice of the intent to move with the clerk of the court that issued the custody order and send a copy of the notice to a parent who was not awarded custody and who has been granted visitation rights under IC 31-17-4 . . .
>
> . . . .

Indiana Code § 31-17-2-23 provides a procedure for the parties and the court to follow when one party seeks to relocate with minor children after a final decree has been entered. Father directs us to no statute or caselaw requiring that a relocation conducted while provisional orders are in place requires the same steps that a post-decree relocation does. Indeed, the logic behind this distinction is clear: provisional orders are temporary orders that suffice until a full evidentiary hearing can be held. Post-decree modifications are conducted after a court has determined, with benefit of a full evidentiary hearing, that a particular custody order is in the best interests of a minor child. Since no final decree was entered by the trial court, Ind. Code § 31-17-2-23 does not apply in this situation.

. . . .

SHARPNACK, C. J., and KIRSCH, J., concurred.

WALKER v. PILLION, No. 29A02-0009-CV-604, ___ N.E.2d ___ (Ind. Ct. App. May 30, 2001).

[T]he Pillions rely entirely on the text of Ind. Trial Rule 50(A), which provides in relevant part:

> Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. A party may move for such judgment on the evidence. . . .
>
> (4) in a motion to correct errors; or
> (5) may raise the issue upon appeal for the first time in criminal appeals but not in civil cases . . . .

. . . Citing subsection (5), the Pillions insist that Dr. Walker was required to move for judgment on the evidence before the trial court in order to preserve his claim of error.

. . . .

Trial Rule 50(A), . . . clearly permits the nonprevailing party in a civil case to challenge the evidentiary basis of a jury verdict for the first time after judgment has been entered on the verdict. Thus, the sufficiency issue is not waived by the failure to raise the issue earlier. Under the rule, however, where a judgment on the evidence is sought after judgment has been entered, the motion may only be made in a motion to correct errors. See T.R. 50(A)(4); Huff v. Travelers Indem. Co., 266 Ind. 414, 421, 363 N.E.2d 985, 990

(1977); see also T.R. 59(J)(7) ("In reviewing the evidence, the court shall . . . enter judgment, . . . if the court determines that the verdict of a non-advisory jury is clearly erroneous as contrary to or not supported by the evidence . . . .). . . .

. . . .

In 1989, our supreme court amended Ind. Trial Rule 59 by removing the motion to correct error as a condition precedent to an appeal except in two specific instances: (1) where a party seeks to address newly discovered evidence, and (2) where a party claims that a jury verdict is excessive or inadequate. [Citations omitted.] The sufficiency issue presented here concerns neither newly discovered evidence nor a claim that the verdict is excessive. Accordingly, a motion to correct error was not mandatory under Ind. Trial Rule 59(A). Nevertheless, as discussed above, the motion to correct error is the only procedural device by which a party may challenge the verdict in the trial court after judgment has been entered. To the extent that subsections (4) and (5) of Trial Rule 50(A) suggest that a civil litigant is required to move for judgment on the evidence in a timely motion to correct error in order to preserve a sufficiency claim, they are inconsistent with the current version of Trial Rule 59(A).

. . . [W]e hold that Dr. Walker was not required to move for judgment on the evidence in the trial court before addressing the sufficiency issue in his appellate brief. [Citation omitted.] Because Dr. Walker has not waived review of the issue, we turn to the merits of his appeal.

. . . .

KIRSCH and MATTINGLY-MAY, JJ., concurred.

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